

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 CALVIN MALONE, et al.,

11 Plaintiffs,

12 v.

13 MARK STRONG, et al.,

14 Defendants.

CASE NO. 3:16-CV-05284-RBL-DWC

ORDER

15 The District Court referred this 42 U.S.C. § 1983 action to United States Magistrate
16 Judge David W. Christel. Currently before the Court are six “Motion[s] for New Counsel and for
17 ‘Opt-Out Class’ Status.” Dkt. 66-71. The Motions were filed by Plaintiffs Robert E. Lough, Gary
18 Shaw, Elmer Campbell, Tremayne Francis, Curtis Brogi, and William Curry, Jr. (“Plaintiffs”).
19 *See id.* In the Motions, Plaintiffs request the Court: (1) assign different counsel; and (2) assign
20 Plaintiffs an “opt-out class status.” After review of the Motions and relevant record, the Court
21 concludes Plaintiff will not be assigned new counsel. Further, this is not a class action, thus,
22 Plaintiffs will not be granted “opt-out class status.” Therefore, the Motions (Dkt. 66-71) are
23 denied.
24

1 First, Plaintiffs request new counsel because Mr. Arbenz was appointed to represent
2 Plaintiffs pro bono, but sent Plaintiffs a contingency fee agreement. *See* Dkt. 66-71. There are
3 approximately 200 Plaintiffs currently alleging constitutional violations arising from the potable
4 water at the SCC. *See* Dkt. 62. This Court determined exceptional circumstances exist which
5 allowed the Court to assist Plaintiffs in securing counsel. Attorney Casey Arbenz was identified
6 as an attorney willing to represent one or all IFP Plaintiffs pro bono upon entering an agreement
7 regarding the terms of representation. *See* Dkt. 40. Mr. Arbenz is the attorney of record for
8 Plaintiffs. *See* Dkt. 61. Mr. Arbenz was appointed under the Pro Bono Plan (“the Plan”) to
9 represent Plaintiffs in this case. The purpose of the Plan is for “furnishing representation to *pro*
10 *se* litigants in civil rights actions where the Court exercises its discretion to provide such
11 representation.” General Order 10-05. Under Section 5 of the Plan, “[t]he appointed attorney or
12 the firm with which the attorney is affiliated shall seek reimbursement from the *pro se* litigant for
13 the costs incurred in litigating the action to the extent the litigant is able to bear such costs.” If a
14 litigant is unable to bear costs of the litigation, the pro bono attorney may apply for
15 reimbursement of reasonable expenses from the Western District Court Civil Rights Litigation
16 Fund. Under the Plan, the appointed attorney may only be required to bear costs of the litigation
17 if reimbursement is not available from the litigant or the litigation fund. Regardless of whether
18 Plaintiffs proceed *pro se* or with counsel, be it Mr. Arbenz or newly appointed counsel, Plaintiffs
19 are responsible for all costs and fees associated with this case. For example, Plaintiffs would be
20 required to pay for discovery expenses, expert fees, subpoena fees, and transcript expenses.
21 Because Mr. Arbenz is appointed under the Plan, he is able to seek reimbursement from the
22 Litigation Fund, if Plaintiffs are unable to pay for litigation expenses. If Plaintiffs proceed *pro se*

1 they will be responsible for litigation expenses and will not have the opportunity to seek
2 reimbursement through the Litigation Fund.

3 Regarding a fee award, the contingency fee agreement allows Mr. Arbenz to collect fees
4 if the case is resolved favorably for Plaintiffs. *See e.g.* Dkt. 66. If the Court were to assign new
5 counsel, the new counsel would also likely have an agreement which would allow the attorney to
6 collect fees if the case is resolved favorably for Plaintiffs.

7 The Court also notes Mr. Arbenz agreed to represent Plaintiffs in the SCC potable water
8 cases “pro bono *upon entering an agreement regarding the terms of representation.*” Dkt. 40, p.
9 3 (emphasis added).

10 For the above stated reasons, the Court finds Plaintiffs have failed to show Mr. Arbenz’s
11 contingency fee agreement is in violation of the Plan. Accordingly, the Court declines to appoint
12 new counsel to represent Plaintiffs because Mr. Arbenz sent contingency agreements to Plaintiffs
13 and is seeking to recover the cost of litigation expenses from Plaintiffs.

14 Second, Plaintiffs’ request to be allowed to opt-out of class status. At this time, Plaintiffs’
15 cases have been consolidated into one case, *Malone, et al. v. Strong, et al.*, 3:16-cv-05284-RBL-
16 DWC (W.D. Wash.). Class status has not been certified. Therefore, Plaintiffs’ request to opt-out
17 of class status is denied as moot.

18 In conclusion, the Motions (Dkt. 66-71) are denied. However, as Plaintiffs may have
19 misunderstood the nature of the appointment of pro bono counsel, Plaintiffs may file motions to
20 proceed *pro se* on or before September 18, 2017. The Court reminds Plaintiffs, for any Plaintiff
21 who decides to proceed *pro se*, that Plaintiff will still be responsible for all costs and expenses of
22 litigation (i.e. fees for expert witnesses, subpoenas, transcripts, and discovery expenses) and will
23
24

1 not have the opportunity to seek reimbursement through the Litigation Fund. In addition, any
2 Plaintiff who decides to proceed *pro se* will likely not be included in the consolidated case.

3 The Clerk is directed to send a copy of this Order through the U.S. Postal Service to
4 Plaintiffs Robert E. Lough, Gary Shaw, Elmer Campbell, Tremayne Francis, Curtis Brogi, and
5 William Curry, Jr. at the Special Commitment Center.

6 Dated this 29th day of August, 2017.

7 
8

9 David W. Christel
United States Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24